**Editor's note: 80 I.D. 209.**

ASA V. PERKES

IBLA 72-32 Decided February 14, 1973

Appeal from a decision of the Idaho State Office, Bureau of Land Management, rejecting appellant's color of title applications, I 4369 and I 4370.

Reversed and remanded.

Words and Phrases

"Grantor". The word "grantor" as used in the Color of Title Act, 45 Stat. 1069 (1928), as amended, 43 U.S.C. § 1068 (1970), means a person by whom a grant is made, grant being a generic term applicable under the statute to all transfers of real property, including devises and transfers by operation of law.

Color or Claim of Title: Generally

Under the Color of Title Act, 45 Stat. 1069 (1928), as amended, 43 U.S.C. § 1068 (1970), an applicant's period of adverse possession

may commence at a time when title to the land is being held by a state pursuant to the provisions of the Carey Act, 28 Stat. 422 (1894), as amended, 43 U.S.C. §§ 641 et seq. (1970).

Color or Claim of Title: Generally

The period of possession of a color of title claim, having been initiated when the land was subject to appropriation under the public land laws, is not interrupted by a subsequent period of time during which the land was not open for appropriation.

APPEARANCES: William G. Carlson, Esq., Arco, Idaho, for appellant.

OPINION BY MR. GOSS

Appellant has appealed from an Idaho State Office, Bureau of Land Management, decision dated June 30, 1971, rejecting his class 1 color of title applications, I 4369 and I 4370, for two 40-acre tracts of land in Butte County, Idaho. The decision held that at the time of initiation of the color of title claims the land was not vacant, unappropriated unreserved public land subject to the public land laws. No ruling was made as to whether appellant complied with the other requirements of the Color of Title Act.

The land involved in this appeal was patented to the State of Idaho under the provisions of the Carey Act, 28 Stat. 422, as amended, 43 U.S.C. §§ 641 et seq. (1970), on July 31, 1923. The Carey Act provided for the donating, granting and patenting of desert lands to a state that complied with the requirements of the Act. The purpose of the Act was to promote the reclamation of desert lands and the State was not authorized to lease any of the lands, or to use or dispose of them in any manner, except to secure their reclamation, cultivation, and settlement.

A Carey Act project involving the lands in issue was commenced but not completed. By deed dated September 4, 1942, the State of Idaho reconveyed the lands to the United States. However, the lands were not available for appropriation under the public land laws until provisions for the opening of such lands were made by Bureau of Land Management order, Misc. 55843, dated March 30, 1950.

The pertinent part of the Color of Title Act, 45 Stat. 1069, as amended, 43 U.S.C. § 1068 (1970), reads as follows:

> The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, * * * issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre: * * *

This type of claim is designated by 43 CFR 2540.0-5(b) as a class 1 claim.

The basis for appellant's color of title claims are two tax deeds executed in 1937 by Butte County, Idaho, in favor of appellant's predecessors in interest. The State Office decision held that adverse possession could not have begun to run against the United States in 1937 because the State of Idaho owned the lands. Appellant argues that adverse possession was initiated in 1942 when the State of Idaho reconveyed the lands to the United States.

A question exists in connection with application I-4369. The origin of the claim in that application was a tax deed to A. R. Babcock in 1937. By probate decree of distribution the subject land passed to Maude E. Babcock. May A. R. Babcock be considered one of appellant's "grantors" under the Color of Title Act, 43 U.S.C. § 1068 (1970)? The courts have interpreted "grant" broadly to include a devise, Commissioner of Internal Revenue v. Plestcheeff, 100 F.2d 62 (9th Cir. 1938), as well as transfers by operation of law, White v. Rosenthal, 35 P.2d 154 (1934). The term "grantor" is defined in Black's Law Dictionary 829 (4th ed. 1951) as "the person by whom a grant is made;" "grant" being defined as "a generic term applicable to all transfers of real property." These interpretations coupled with the fact that the Color of Title Act is remedial and to be liberally construed, Harry H. Scott and Nion R. Tucker, A-15425 (April 10,

1933), make it clear that A. R. Babcock may be considered a grantor within the meaning of the Color of Title Act.

Even though the lands were owned by the State of Idaho in 1937, such is not a bar to the inception of the color of title claims. The Department stated in Harry H. Scott and Nion R. Tucker, supra, that:

> In the decision appealed from it was held that in the requirement of adverse possession for at least 20 years, the law contemplates that the possession must be of public lands, as such, for that length of time, and that the requirement of the law is not met where the land had the status of private land for a portion of that period. The Department regards this as an extreme and harsh interpretation. The act is remedial in nature and should be liberally construed. The interpretation complained of is not only not liberal but is actually strained and unnatural. We are authorized to sell only public land, but if the land be public at this time it is immaterial to the purpose of the act that the land may have been claimed or held in private ownership during a portion of the required 20-year period of possession. Furthermore, while this land may be regarded in a technical sense as having been in private ownership under the patent to the railroad company, nevertheless the Government had such interest in it as to justify resumption of the legal title in order to enforce the purpose of the original grant.

Appellant's period of good faith holding began to run in 1937 and continued until 1969 when appellant learned he did not have good title to the land. Even though a color of title claim could not have been initiated between 1942 and 1950 when the lands were not open to appropriation under the public land laws, such intervening period cannot now operate to defeat appellant's color of title claims. The 1942-50 period is somewhat analagous to a period of withdrawal. Clearly,

a color of title claim could not be initiated upon withdrawn or reserved lands. 43 CFR 2540.0-5(b); Margaret C. More, 5 IBLA 252 (1972); Palo Verde Color of Title Claims, 72 I.D. 409 (1965); Claude M. Williams, Jr., et al., A-29928 (March 26, 1964). However, if a color of title claim arose before a withdrawal of the lands, the withdrawal would not preclude perfection of the claims under the Color of Title Act. Clement Vincent Tillion, Jr., A-29277 (April 12, 1963).

The subject lands are presently public lands, having been restored to that status by the 1950 order. The definition commonly assigned to "public lands" is those lands subject to sale and disposition under the general laws. Borax Consolidated, Ltd., et al. v. Los Angeles, 296 U.S. 10, 17 (1935). Appellant has fulfilled the requirement of holding a tract of public land in adverse possession for more than twenty years.

Applications I-4369 and I-4370 show that Asa V. Perkes took title as "Asa V. Perkes, et ux." Therefore, appellant should be required to amend his applications to include as applicants his wife or her successors in interest or file on record any relinquishment of her interest in the lands.

If appellant has fulfilled the other requirements, patents should issue. The July 28, 1953, amendment, 67 Stat. 227, to the Color of Title Act, supra, makes the issuance of a patent by the

Secretary to a class 1 claimant mandatory if it is found that the conditions prescribed in the statute are met.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded for appropriate action consistent with this decision.

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Joseph W. Goss, Member

We concur:

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Frederick Fishman, Member

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Anne Poindexter Lewis, Member